

CLEAR GRAVEL ENTERPRISES, INC.
THE DREDGE CORPORATION, INC.

DEC 29 1959

A-27967

A-27970

Decided

Mining Claims: Discovery

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void.

Mining Claims: Discovery--Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-27967 :
Clear Gravel Enterprises, Inc. : Contest Nos. 121 et al.
: Sand and gravel claims declared
A-27970 : invalid.
The Dredge Corporation, Inc. : Affirmed.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

These are two appeals to the Secretary of the Interior filed by the Dredge Corporation, Inc., and Clear Gravel Enterprises, Inc., from decisions of the Director, Bureau of Land Management, dated December 15 and 16, 1958, affirming decisions of a hearing examiner, dated July 15 and November 27, 1957, declaring certain sand and gravel claims to be null and void for want of discovery. The Director's decision of December 15, 1958, also modified the examiner's decision of July 15, 1957, to the extent that it held some of the Dredge claims to be valid. The Director held these claims also to be invalid.^{1/}

As all of the claims of both appellants are located in either T. 20 S. or T. 21 S., R. 60 E., M. D. M., Nevada, the numerous contests involving the 28 Dredge Corporation claims were consolidated into one hearing, and the two contests involving Clear Gravel Nos. 10 and 11 were also consolidated into one hearing.

Before the merits of the appellants' appeals are considered, certain factors common to all of the claims should be pointed out.

All of the claims are located in an area from five to eight miles west of the city of Las Vegas, Nevada, in the Las Vegas Valley. According to testimony adduced at the Dredge hearing, the waters of this valley, both surface and ground water, are impregnated with calcium carbonate, which has in many places cemented the gravels and sediments in the soil into a hard pan, or cemented conglomerate, of varying thickness. This hard pan is known locally as "calichi" (or caliche) and is found at various depths in different parts of

^{1/} The contest numbers and the names of all the sand and gravel claims involved are contained in the attached appendix.

the valley. In some places the hard pan is visible on the surface and at other places it may be located only at depth. (Dredge transcript p. 52.)^{2/} The evidence at the hearing indicates that calichi was encountered in all excavations on all of the claims at an approximate depth of six inches to five feet. The evidence further disclosed that the calichi was undisturbed on all of the claims and any excavations that were made were from the surface down to a point where the calichi was first encountered. The calichi is of such hardness that it must be blasted in order to remove it where it occurs in depth of more than several inches. As the appellants have made no attempt to dig into or through the calichi underlying their claims, the thickness of the calichi deposit is unknown.

From the testimony in the record it is disclosed that the only gravel located on any of the claims is that which lies above the calichi deposit and in small deposits in the washes, or dry stream beds, on some of the claims. The gravel above the calichi is for the most part coated with a calcareous material. Some of the testimony at the Dredge hearing was to the effect that this coating is not deleterious and that the gravel could be used for concrete aggregate. However, there was no testimony that any such use had ever been made of this gravel, and for the most part it appears to have been used for fill in road construction, parking lots, etc., and in the manufacture of asphaltic concrete.

Insofar as development of the claims is concerned, the testimony at the hearing was that 500 yards of material were removed from each of Dredge claims Nos. 52, 53, 55 and 56. (D. Tr. 290, 292, 295, 296.) No other material had ever been removed from any of the claims and sold from the time they were located in July 1952, until the date of the hearing. The witness who testified that this gravel had been removed from the claims, processed, and then sold, did not know what percentage of the material was rejected for dirt, silt, etc. (D. Tr. 305-306), and admitted that the material from the claim could have come from wash areas (D. Tr. 301, 302), which contain gravel of a better and cleaner grade since the water removes the silt from the material (D. Tr. 302). He also conceded that water may carry gravel from higher ground and deposit it in a wash and that, therefore, gravel found in a wash will not necessarily indicate that similar or the same material will be found outside the wash (D. Tr. 302). There is no indication in the Clear Gravel case that any material had ever been removed from the two Clear Gravel claims.

Except for the removal of the material mentioned above, the only operations conducted on the claims have been the digging

^{2/} Hereafter references to the transcript of hearing in the Dredge case will be designated as (D. Tr. _____).

of so-called "discovery pits" and trenches made by dozers pushing the surface material into piles. These dozer trenches were only the width of the bulldozer blade. For the most part, these pits and dozer trenches averaged $2\frac{1}{2}$ feet in depth. It would appear from the record that most, or a large part, of the pits and dozer trenches on the various Dredge claims were made after the claims were examined by a mining engineer employed by the Bureau of Land Management in November 1954, or some time in the latter part of 1955 (D. Tr. 268).

In his decision in the Dredge case, the Director pointed out that Dredge Nos. 52, 53, 54, 55, 56 and 57 are leased to the Wells Cargo Company, which operates a commercial gravel pit on Dredge Nos. 61 and 62. Dredge Nos. 61 and 62 were not contested. The operations on Nos. 61 and 62 have been extended northward into the southwest portion of Dredge No. 54 which also was not contested. The hearing examiner concluded that Dredge Nos. 52, 53, 54, 55, 56, and 57 were valid claims. However, the Director concluded that the deposits in the other portions of Dredge No. 54 and the deposits in Dredge Nos. 52, 53, 55, 56 and 57 are of diminishing quality and quantity as the distance from the workings in Nos. 61 and 62 increases; that test "discovery" holes and cuts on all these lands show a poorer grade and more shallow deposits as distance to the main pit increases; that the small quantities of gravel in the deposits remaining are of shallow depth and are underlain by conglomerate, and that such deposits as remain on the claims are of such poor quality that economic (commercial) operation thereof are impractical because the cost of recovery and processing would be prohibitive.^{3/} The Director, therefore, concluded that marketability of the remaining deposits was not shown, and notwithstanding the proximity to the Wells Cargo pit, he believed a prudent man would not be warranted in expending his labor and means with the reasonable expectation of success in developing a mine on any of the lands involved in this proceeding, and therefore the Dredge Nos. 52, 53, 54 (excluding the southwest portion), 55, 56 and 57 were null and void.

The Department has held that in order to constitute a valid discovery on a placer claim located for sand and gravel it must be shown that the materials can be extracted, removed, and marketed at a profit. This includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the sand and

^{3/} One of the contestee's witnesses in the Dredge case testified that it would cost \$80,000 to \$100,000 to put a gravel processing plant on the claims similar to the plant the Wells Cargo Company had on the Dredge Nos. 61 and 62 claims. This cost does not include trucks or other hauling equipment (D. Tr. 307, 308).

gravel. United States v. Everett Foster et al., 65 I. D. (1958); Associate Solicitor's opinion M-36295 (August 1, 1955); Solicitor's opinion, 54 I. D. 294 (1953); Layman et al. v. Ellis, 52 L. D. 714 (1929).

As to claims located for sand and gravel, discovery, including marketability, must be demonstrated prior to the withdrawal of the land from location for the common varieties of sand and gravel effected by the act of July 23, 1955 (30 U. S. C., 1958 ed., sec. 601, et seq.).^{4/} United States v. P. D. Proctor et al., A-27899 (May 4, 1959). When adverse proceedings are brought against a claim the government has the burden of establishing a prima facie case that no valid discovery has been made. However, once a prima facie case has been established by the government the burden is then on the mining claimant to prove a valid discovery of valuable mineral deposits which, in the case of claims located for sand and gravel, includes a showing as to the existence of a present demand and marketability prior to passage of the act of July 23, 1955, supra. United States v. Francis N. Droughy et al., A-27668 (September 24, 1958); cf. United States v. Estate of Victor E. Hanny, A-27362 (September 24, 1957).

In United States v. Everett Foster et al., supra, which also involved sand and gravel claims in the Las Vegas Valley area (specifically, T. 22 S., R. 61 E., M. D. M., Nevada), the Department held that although the Government had not conclusively proven by its witnesses that the deposits on the claims could not be disposed of at a profit, the weight of the evidence was that there was no present demand for the deposits on the claims, that such deposits could not be disposed of at a profit, and that this being so the Government must prevail. The appellants brought suit against the Secretary in the United States District Court for the District of Columbia. The appellants contended, among other things, that the Secretary wrongly imposed the burden of proof upon them and that the Government has the burden of proving its charges conclusively. The District Court ruled in favor of the Secretary and an appeal was filed to the United States Court of Appeals for the District of Columbia Circuit (Civil No. 14953).

In a decision rendered October 22, 1959, the Court affirmed the decision below. In regard to the allegation of error concerning the burden of proof, the Court said:

^{4/} Section 3 of the act (30 U. S. C., 1958 ed., sec. 611) provides that deposits of common varieties of sand and gravel shall not be deemed to be valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claim thereafter located under such laws.

"One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only 'taken the initial steps in seeking a gratuity from the Government.' Ickes v. Underwood, 78 U. S. App. D. C. 396, 399, 141 F. 2d 546, 549, cert. denied, 323 U. S. 713 (1944); Rev. Stat. 2319 (1875), 30 U. S. C. sec. 23 (1952). Until he has fully met the statutory requirements, title to the land remains in the United States. Teller v. United States, 113 Fed. 273, 281 (8th Cir. 1901). Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary." (Slip copy, p.3.)

In respect to the Secretary's ruling that mining claimants for sand and gravel deposits must show present marketability, the Court cited with approval the Department's holdings in Layman v. Ellis, supra, and Estate of Victor E. Hanny, 63 I. D. 369 (1956), and said:

"Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development." (Slip copy, p. 4.)

After carefully examining the record in this case, I find very little to distinguish it from the Foster case. In both cases the claims are located in an area where the very soil itself consists mostly of sand mixed with some gravel. With the exception of some deposits of gravel found in small deposits in dry washes, the gravel is not extensive nor is it of good quality. In this case, as in the Foster case, it was brought out that the county does not buy sand and gravel which it uses for road building unless it cannot be obtained free of charge or through arrangements whereby the sand and gravel are obtained in exchange for services. In the Foster case the Department pointed out that--

"Although the contestees had held these claims for over 3 years at the time of the hearing, they had not been able to dispose of any material from the claims, even in what they urged was an expanding market. While the fact that no sale had been made at the time of the hearing is not controlling in itself, yet it is persuasive that certain factors must

have been involved which prevented the sale. If the deposits were of acceptable quality and existed in such a quantity as to make the extraction worthwhile, then if the demand were there the contestees should have been able to dispose of the material at a profit. On the other hand, if the market was such that it would not pay to extract the material and haul it to that market, then it cannot be said that the deposits from these claims meet the test of discovery for sand and gravel claims under the mining laws." (Supra, pp. 7-8)

Considering the facts established by the testimony at the hearing and the various exhibits in the record, it is my conclusion that the same comment above can reasonably be applied to the claims here involved. Moreover, it should be noticed that in the Foster case the claims are located approximately 13 miles from the market in Las Vegas and that this distance was considered to be too far from the market to make hauling profitable. As previously stated, the claims here are half that distance from Las Vegas. Thus, an unfavorable factor which may have prevented sales in the Foster case was absent in this case and still no sales were made in the nearly five years from the location of the claims in 1952 until the hearings in 1957. The only evidence of the existence of a market for the sand and gravel in these claims is reference to a prospective market which may develop as a result of a future road building program under the Federal Highway Act. In the Foster case, supra, the Department pointed out that "a prospective market, using that term in the sense of a market to be developed in the future, is not sufficient to establish the validity of a claim under attack at the present time." (Supra, p.8.) See U. S. v. J. R. Clements, A-27751 (December 15, 1958).

In their appeal to the Secretary the appellants argue that the Director's decision was in error because it gave a retrospective effect to the act of July 23, 1955, supra, in that the Director stated in the syllabus to his decision that a placer mining location for deposits of a common variety of sand and gravel is invalid where it is not perfected by a valid discovery of deposits having a present actual market value prior to the enactment of the act of July 23, 1955.

The appellant's contention is without merit. Section 3 of the act of July 23, 1955, supra, provides that deposits of common varieties of sand and gravel shall not be deemed to be valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claim thereafter located under such law. As the claims here were located only for sand and gravel, and it is not alleged that the sand and gravel was other than a common variety, it follows logically that the claims could only

have been validated by a discovery (including marketability) made prior to the enactment of the act of July 23, 1955. United States v. P. D. Proctor et al., supra; Estate of Victor A. Hanny, A-27362 (September 24, 1951); see United States v. G. C. (Tom) Mulkern, A-27746 (January 19, 1959).

The appellants rely upon the language in section 3 of the act to the effect that common varieties of sand and gravel, etc., shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States "so as to give effective validity to any mining claim hereafter located under such mining laws * * *" and contend that the act thus expressly limits its application to claims located after its enactment. It is fundamental that under the mining laws discovery of valuable minerals is as essential to the establishment of a valid location of a placer claim as it is in regard to lode location. Lindley on Mines, 3rd ed., sec. 432. Until a discovery is made, a mining claimant holds his entry by sufferance and not by right and has no title or interest in the public domain. Bakersfield Fuel and Oil Co., 39 L. D. 460 (1911); Waskey v. Hammer, 223 U. S. 85 (1912). Where the Congress or the Department withdraws the land from the operation of the mining laws, a mining claim is excepted from the force and effect of withdrawal if, and only if, a valid discovery has been made, regardless of whether or not a discovery is made after the withdrawal is made. L. W. Lowell et al., 40 L. D. 303 (1911); Butte Oil Company, 40 L. D. 602 (1911); Cameron v. United States, 252 U. S. 450, 456 (1920). The passage of the act of July 23, 1955, supra, since it specifically withdrew the consent of the United States to mining claims located for the so-called common varieties of sand and gravel can only be regarded as a withdrawal of such lands from the mining laws, and it necessarily follows that for a mining claim located for the common varieties of sand and gravel to be excepted from the effect of such withdrawal a valid discovery must be proven prior to July 23, 1955. Cf. United States v. U. S. Borax Co., 58 I. D. 426 (1944). Having concluded that the appellants had failed to prove the existence of a valid discovery prior to the passage of the act, the Director properly held that the claims were null and void. This conclusion is not a retrospective application of the July 23, 1955, act, as the appellants contend.

Accordingly, for the reasons discussed above, it must be held that the mining claims listed in the attached appendix are without validity.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

(Sgd) Edmund T. Fritz
Deputy Director

APPENDIX

A-27967

Clear Gravel Enterprises, Inc.

Contest Nos. 189 and 190.

Clear Gravel Nos. 10 and 11.

A-27970

The Dredge Corporation

Contest Nos. 139, 140, 141, 142,
143, 159, 160, 161, and 162,
respectively.

Alpha, Beta, Beta, Epsilon,
Gamma and Dredge Nos. 1, 2,
3, and 4 placer mining claims.

Contest Nos. 144, 145, 146, 147,
149, 151, 152, 153, 148 and
150, respectively.

Dredge Nos. 13, 14, 15, 16, 36,
37, 40, 41, 44 and 45 placer
mining claims.

Contest Nos. 123, 124, 208, 125,
121 and 122, respectively.

Dredge Nos. 52, 53, 54 (excluding
southwest portion), 55, 56 and
57 placer mining claims.

Contest Nos. 127, 128 and 129,
respectively.

Dredge Nos. 63, 64 and 66 placer
mining claims.